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## THE HUMANITARIAN DOCTRINE AS RESPECTS EMPLOYEES.

The humanitarian doctrine in contributory negligence cases means, that, where one is seen to be in a position of peril, the one, who sees him, must, if he has the means at hand to do so, warn him of the danger he appears to be unmindful of rather than run upon him, though this peril results from the exposed person's own negligence. This principle has long been recognized in Missouri. By a very recent decision, however, the Supreme Court of that state has held that the application of this doctrine is different as between employees and strangers. Degonia v. Railroad, 123 S. W. 807.

We submit that, if our readers will pause at this place and ask themselves what direction this difference, if there is any, takes, they would at least, be divided in opinion as to whether the doctrine was to be more favorably applied in behalf of employees than strangers. The Missouri court decided, that there was a difference and it operated against employees.

In the Degonia case an employee, knowing that an express train was due to pass a certain station within a short time, began shovelling cinders from the track. While his back was turned in the direction from which the train was approaching and he was apparently oblivious of danger, he was run upon by the train, going at rapid speed, he being in clear view of the engineer. The employee was shouted at by one of his companions, but apparently did not hear, and no engine whistle gave a warning blast.

The court conceded that such a state of facts would have carried the case to the jury had the intestate of plaintiff not been the company's employee, having knowledge of the expected arrival of the train, and it formulated the general principle, that the doctrine of which we speak was to be applied less strictly in behalf of employees than others.

Before taking issue with the court as to the correctness of such a principle, we desire to say, that we not only find more of its prior decision against its latest ruling than the opinion concedes, but we also fail to find the remotest suggestion of any such principle in any one of the cases it cites or any other Missouri case we have examined. In many cases the reasoning is upon the line of there being no such distinction.

Thus, take Brockschmidt v. Railroad, 205 Mo. 435, in which the opinion was written by Fox, J., who announces his full concurrence in the Degonia case, independently of all question whether he now stands opposed to former view of the court or not. Judge Gantt, who concurred with Judge Fox, in the Brockschmidt case, in the Degonia case merely agrees to the result. The Brockschmidt case was not that of an employee of defendant, but the opinion in the Degonia case appears to assume it was. Judge Fox, however, compared an employee with the injured party as to knowledge of the situation, relying on Clancy v. Railroad, 192 Mo. 615, an employee case, which ruled, for other reasons, that the humanitarian doctrine was not involved. Evans v. Railroad, 178 Mo. l. c. 512, an employee case, was also relied on by him and there it was distinctly said: "Those in charge of trains have a right to presume in the first place that such persons (employees) will keep out of danger, and not until they have good reason to believe they will not do so and then fail to use all proper means at their command to prevent injuring them," should defendant be held liable.

If the Brockschmidt case is not upon every fair construction against the Degonia case, these Missouri judges might do well to stop writing their inordinately long opinions and content themselves with a brief announcement of their conclusions.

The case of Cahill v. Railroad, also found in 205 Mo., at page 205, relied on by the prevailing opinion in the Degonia case, is merely irrelevant on this question. It

holds, and cites very respectable authority to show, that in the conduct of its business a railroad may assume that employees are observant of their surroundings, and warning signals do not have to be given, as when an engine is running in places where strangers, less acquainted with what is going on, might be exposed to sudden dangers.

The cases above referred to, except the Degonia case, were decided in Division and it is, of course, the duty of the court *en banc* to correct error in division. But as the Degonia opinion refers to division cases as supporting authority, we challenge its references.

However, we have a prior unanimous decision of this court, *en banc* which we think wholly inconsistent with the Degonia case. Sharp v. Railroad, 161 Mo. 214. That case speaks as did the Evans case. Thus it says, in effect, that it was shown not to be customary to sound the whistle for section men *unless they seemed to be unmindful of an approaching train.* Because, in the Sharp case, the whistle *was* sounded when the train was distant a few lengths of the cars, the engineer was considered to have done all that was required and for this reason alone the railroad was absolved from liability.

The Sharp case, therefore, laid down the rule recognized in the Evans case; the latter was approved in the Brockschmidt case, and yet the Brockschmidt case is relied on to support the Degonia case.

Having said this much to show how the Missouri court has turned away from its record, and has not hesitated thus to do by a bare majority, it might be asked, what overruling necessity, as opposed to desirable uniformity in precedent, confronted this majority? The principle might be considered harsh if incorrect, but its declaration, even if right, suggests no special urgency therefor.

But we dispute its correctness as a principle, and believe that one man's life seen to be in peril ought to be cared for as well as another's. We see no mercy or justice in any law, that will seek out distinctions of this kind. A human being is about to be slain by a locomotive or a street car, unless the engineer or motorman, having the means at hand, gives him timely warning. Shall it be said his negligence in being exposed is of no moment, if he is a stranger, but the killing is excusable if he sustains a contractual relation to the railroad or street railway? Would the engineer hesitate to pull the throttle, or the motorman to ring his gong or turn off his current, on any such consideration, or would it be expected by anybody, that he would?

More than this, however, we assert, that, if any distinction is to be found in such matters of life and death, it should be rather expected in cases of employees than of strangers, and we think there is authority for this view.

In Comstock v. Railroad, 56 Kan. 428, it was said, in effect, that an employee, being at his post of duty, is entitled to receive warning, and we believe abundant cases on the same line can be found. It is but an application of the rule, that a master is reasonably bound to give the servant a safe place to work. Also, if a servant's post of duty is, where danger may arise, he is nevertheless bound to give requisite attention to the work he is sent to perform and he is not expected to keep a constant lookout for danger. Railroad v. Kane, 70 Ill. App. 676.

In the case of St. Louis I. M. & S. R. Co. v. Jackson, 93 S. W. 746, 6 L. R. A. (N. S.) 646, the Arkansas Supreme Court approved an instruction as follows: "If plaintiff's intestate was absorbed in the performance of the duties of his employment and was thus oblivious to danger and did not see and did not hear the train approaching him; and if a man of ordinary prudence and care for his own safety, situated as plaintiff's intestate was, would have been so absorbed and oblivious of his surroundings and would not have seen and would not have heard the train approaching, then plaintiff's intestate was not guilty

of contributory negligence which would bar a recovery in this case."

That instruction says nothing about discovered peril, but would it not have seemed absurd to distinguish the humanitarian against him, because he had gone there knowing that a train would soon arrive?

Every employee on a track may be fairly supposed to be there in the interest of his railroad, while such is not so as to a stranger or trespasser. Shall a railroad be justified in running upon one who is oblivious because he is working for it, and not when obliviousness arises from one who is absorbed for other reasons?

We may further say the Sharp case furnishes an excellent, if there is any, reason for a distinction in favor of, rather than against employees. It is there said, in effect, to be customary to warn employees apparently unmindful of danger. Assuming that employees are acquainted with such custom, is it not far less reckless for an employee to expose himself to peril than for one unacquainted with such custom?

Therefore, it is not an answer to say the employee is more negligent than the other, because he knew better. The real point is whether it is not fully as, if not more, careless for an engineer or motorman to run upon one presumably at his post of duty than upon one who appears to be where he has no business to be?

We came across a case in Georgia, to-wit, the case of Rawlston v. Railroad, 94 Ga. 536, holding merely that certain facts showed no cause of action. These facts were that a section man was ordered to go to a certain point as quickly as possible and repair the track before an expected train could arrive, his boss telling him he would look out for the train. The man worked rapidly and excitedly in such emergency. He heard the train coming and waved his hat, in full sight of the engineer, for him to stop. The train was far enough away for this to be done. The section man continued his work driving a spike that saved the train from being ditched, just as he was run upon and killed. This holding was universally condemned as being wholly indefensible. But the tendency of the Missouri ruling is precisely to this result.

What benefit such a ruling can be to any public policy it is hard to imagine. But it well may be thought, that, if railroads are to be favored thus against their employees, the safety of those who travel on trains may be lessened, rather than secured.

On general principles, however, to say there can be any distinction between one person and another, when life can be saved merely by a warning, seems unreasonable and to put an employee below a stranger, in this regard, absurd.

The court by such ruling says prior negligence is suicide in one case, and mere inadvertence in the other. In the former case it presumptively arises from engrossment in duty—in the latter it could have no such excuse.

## NOTES OF IMPORTANT DECISIONS.

**AUTOMOBILES—LOOK AND LISTEN DOCTRINE IN REFERENCE TO STREET CROSSING BY PEDESTRIANS.**—The New York Supreme Court, in Appellate Division, has held that it is not contributory negligence as a matter of law for one not to look in both directions as he steps from the sidewalk to cross a street, because vehicles must keep on their proper side. Brantley v. Jaeckel, 119 N. Y. Supp. 107. The injury to the pedestrian was by an automobile proceeding at a rapid speed on the wrong side of the street. The rule as to looking both ways is distinguished from the case of one going on a railroad track, though one would not have to look but one way, it would seem, if the railroad was double-tracked. The court said: "It is no hardship upon owners of automobiles, which are traveling silently and without any signal of warning, as in this case, and on the wrong side of the street and close to the curb, to hold that the person in control of the car must be observant not only of what is directly in front of it, but of pedestrians who are traveling on the sidewalk and who may step into the street in front of the car."

The automobile "honk" seems as much in judicial cognizance as the engine bell or the street car gong, and the public have the right for one to sound as much as the other.

The plane upon which the three are, as dangerous machines, seems about the same, with rigidity of rule rather against the automobile. We know where a train or a street car has to be, and the New York court says we know where the automobile ought to be, and we can assume the existence of one fact as well as the other. One of the court dissented.

DOMICILE—CHANGING DOMICILE UNDER TREATY RIGHTS.—A very interesting question on the question of change of domicile recently came before the Supreme Judicial Court of Maine. Matthew v. Cunningham, 74 Atl. 809. A former resident of Maine resided at Shanghai, China, at the time of his death. He was there as an American citizen, and under the jurisdiction of United States law, by virtue of a treaty between this country and China. In effect, he came under American law by permission of the Emperor of China.

The court says: "It would appear that the only reason assigned for withholding from the decedent the right of Chinese domicile is that, while he lived on Chinese soil, under Chinese sovereignty, he was subject to laws extended to the particular territory by treaty instead of by edict. We are able to discover neither logic nor reason for the distinction here suggested. The fundamental idea of domicile does not depend upon any distinction with respect to the source of the local law. A Chinese domicile gives the decedent's estate a fixed place of abode, and subjects it to the law governing the locality, whether American law or Chinese law, it is nevertheless the law of the place, as to American citizens."

The question which appears to us is whether or not, if one goes to a place where he is under treaty rights, instead of to a place to which law is extended by edict, if the animus manendi is to be reasonably inferred. A treaty may be abrogated or modified between the high contracting parties whensoever they agree, whatsoever its terms as to duration. Or it may contain on its face provisions, contingent in their nature, which would bring it to a sudden close. Private rights cannot operate to prevent the contracting parties from abrogating or changing.

Therefore, the animus manendi might have a presumed qualification to it which would make it ineffectual to substitute for the old a new domicile. With edict the assumption must be that its effectiveness will continue as fully as in the place removed from.

The Maine court says the leading authority on this issue is the English case in re Tootsal's Trusts, decided in 1883, in which it was held that there was no new acquisition of domicile. It was said that under the treaty between Great Britain and China (same in effect as between United States and China), "no domicile can be acquired in an Anglo-Oriental community," and this was on the ground, as stated by Judge Chitty, that: "There is no authority that I am aware of in English law that an individual can become domiciled as a member of a community which is not the community possessing the supreme or sovereign power."

An arrangement of this sort appears to us more to resemble a "modus vivendi" than a permanent statute, and the fact that it is of probable long duration would not seem to help the matter from the standpoint of principle.

It rather looks to us that the English view is better grounded than the Maine.

The English case being decided in 1883, there might seem an inference that the treaty with our country would have provided otherwise, if the rule was so to be. But we do not by this intimate that China has any interest in the question, but at least it was a matter our treaty could have been explicit about.

COMMON LANDS—CHARITABLE TRUST ARISING OUT OF AN ANCIENT GRANT.—The case of Stead, Att'y Gen., v. President, etc., of Commons of Kaskaskia, 90 N. E. 654, Supreme Court of Illinois, carries us back to the times of Joliet, Marquette and La Salle, and invests its reading with something of the flavor of old romance.

The court, however, was looking for an authentic basis on which to predicate a legal conclusion. And this conclusion was to be directed to an evil which unhappily was far less romantic than real. The parish of the Immaculate Conception of Kaskaskia was given a grant about two hundred years ago, confirmed by a patent in 1743. There was a settlement there known as Our Lady of the Kaskaskias. The patent described the boundaries. This patent was recognized, not specifically, but generally, with other rights in the cession to Great Britain, and when in 1778 George R. Clark made conquest of the northwest territory this was for Virginia, which commonwealth made cession to the United States in 1784. There was a provision in the grant for revenue from the commons to be devoted to educational and religious purposes. Illinois law sought to make this provision effectual and provided for the election of trustees to manage the commons. Sale being forbidden, leases were made for as long periods as fifty years. Fraud crept into the management and bogus bids were made, so that the trustees might resort to private bids. Thus the charitable interest furnished opportunity for graft, and the entire management became honeycombed with

fraud. Fraudulent leases for long periods at nominal prices were made, and the whole affair smelled so rank to heaven, that finally the attorney general of Illinois brought proceedings to oust the trustees, recover moneys appropriated and misappropriated, and to cancel leases. One of the points relied on was that the inhabitants of the parish, and not simply of the village, should have elected the trustees. It seems a strange thing that this question waited so long and the court is, just now for the first time, holding that the parish inhabitants were the proper electors.

We refer to this case, not so much for any particular question of law involved, as to point to the fact that abuses with respect to some 15,000 acres of very valuable land could have continued so long before being called to book. These lands were distributed by a liberal hand in a vast domain, when leagues of land concerned less than feet in this day and time.

But what a wonderful heritage was left to that parish, and how has a charitable purpose been made the opportunity for fraud to go on in its unchallenged career. That beneficent purpose has spread more contagion in evil and undermined morality more deeply and lastingly, than if Joliet, Marquette and La Salle had merely been possessed of a buccaneer spirit, or they had been exploiting America as Lord Clive did the Indies. It seems a sacrilege that a missionary sacrifice has been converted into such a scandal.

## CONDEMNATION PROCEEDINGS FOR MINING PURPOSES.

The right of a mining company to take private property for purposes connected with its business by the exercise of eminent domain, is one that is not yet definitely settled. It is important to note that during recent years there has been a gradual change in the law on this subject, in the direction of permitting persons engaged in the development of mines to avail themselves of this right.

Originally condemnation proceedings could not be had unless the right inured to the public; that is, unless the public had a legal right to use the utility for which the land involved was to be condemned. As illustrating this position we quote from Mr. Mills: "The use to which property is condemned must be public. As between individuals, no necessity, however great, no exigency however imminent, no improvement however valuable, no refusal however unneighborly, no obstinacy however unreasonable, no offers of compensation however extravagant, can compel or require a man to part with one inch of his estate."[1] The point of contention accordingly is whether the development of mines is a public use justifying the exercise of this power. No definition has been or can be constructed which will settle the question as to what constitutes a public use within the meaning of this subject of the law. As one court said, "Doubtless this arises from the fact that the courts have recognized that the definition of 'public use' must be such as to give it a degree of elasticity capable of meeting new conditions and improvements and the ever-increasing needs of society."[2]

California is one of the few Western states holding squarely that the development of mines is not a public business in the sense that property may be taken by eminent domain for their development. Most of the other states have decided otherwise, but usually the right of the public to use the utility constructed was conceded, so that the question as to whether the mining business was of itself of sufficient benefit to the community to permit of condemnation proceedings where the public did not have that right, was not decided.

During recent years, however, a few states have met this last question squarely and decided in favor of the mining companies. As we shall see, this position has been recently approved by the Supreme Court of the United States, so that we may expect most of the states eventually to follow that precedent.

The older view is well illustrated by the decision in an early Illinois case.[3] A certain coal company attempted to condemn a strip of land for the purpose of constructing a tramway extending from its mine to a railroad. The Supreme Court of that state

(1) Mills on Eminent Domain, Sec. 23.
(2) Tanner v. Treasury Co., 83 Pac. 464.
(3) Sholl v. German Coal Co., 118 Ill. 427, 59 Am. Rep. 379.

refused to permit the condemnation, holding that the use for which it was proposed that the land should be condemned was not a public one. "The coal, the coalworks and the present tramway are in the strictest sense private property, and the public generally have no more interest in them or in the operation of the works, including the tramway, than they have in any other strictly private business. * * * Without the consent of the owners of it (the tramway), there is not a person in the state, outside of themselves, who would have the right to ride upon it on any terms that might be proposed, or to have carried upon it a single pound of freight." It will be observed that the court does not consider the public benefit that might accrue by reason of the development of the mine, but only the right of the public to use the tramway.

California early passed a law authorizing the exercise of the right of eminent domain to condemn lands for tunnels, flumes, ditches, dumps, etc., for working mines, and declaring them to be public uses. In a case brought up to the Supreme Court in 1876 it was held that the statute was unconstitutional and void.[4] Said the court: "It is clear from the averments of the complaint that the object sought, is the appropriation of the private property of the defendants to the private use of the plaintiff. It is a private enterprise to be conducted solely for the personal profit of the plaintiff, and in which the community at large have no concern. It is clear that this case does not come within the meaning of that clause of the constitution which permits the taking of private property for a public use after just compensation is made." The plaintiff contended that the statute was a legislative declaration that the construction of ditches and dumping places constituted a public use, and that the judgment of the legislature was conclusive. But the court refused to follow this doctrine, though conceding that the general rule was as contended by the plaintiff, holding that the case came within the exception that "where there was no foundation for a pretense that the public was to be benefited thereby, in such case it would be our duty to interfere and afford relief."

Another western state following the California doctrine is Colorado. It has been held in that state that a tramway to a privately-owned mining claim was clearly a private affair, and that hence property could not be condemned for uses connected therewith. But the Supreme Court of that state seems to be veering about somewhat, judging from a recent decision. In that case the Treasury Tunnel Mining Company, desired to condemn a right of way for tunnel purposes through the Corn Cob lode. It is important to note, however, that it further appeared that the intention of the plaintiff company was to furnish drainage to mines adjacent to its line. The Supreme Court affirmed a decision of the lower court giving it that right. Said the court: "For the development of the great mining industries of this state tunnels of the character contemplated by petitioner are not only expedient but necessary. The necessity of the vesting of corporations of the character of petitioner with the right to exercise the power of eminent domain is apparent; for without this power enterprises of the character contemplated by the petitioner could be thwarted and the development of the mining resources of the state prevented by those owning property crossing the line of a projected tunnel. * * * The use and benefit of the tunnel will be in common and may be enjoyed by all whose properties are so located with reference thereto that they may avail themselves, if they so desire, of the opportunities thus afforded for the development of their properties."[5] It will be noticed that the court does not say that the right would have been granted had the public not had the right to use the tunnel. But the importance attributed to the mining industry may indicate an extension of the rule in case the question comes fairly before the court.

(4) Channel Co. v. Cent. Pac. R. Co., 51 Cal. 269.

(5) Tanner v. Treasury Co., 83 Pac. 464.

In 1903 the Northport Smelting Company, a Washington corporation, filed a petition to condemn certain lands for the purpose of conducting water across the land to its smelter. Certain other questions were involved, but on the point under discussion here the Supreme Court said: "The question as to whether a corporation has a right to condemn land for the purpose of aiding in operating a smelter, on the theory that the operation of the smelter is for a public use, has been decided adversely to the contention of the respondent in Healy Lumber Co. v. Morris."[6] In the case referred to, which involved the right to condemn a right of way for logging purposes, the court said: "It must be conceded that there are quite a number of decisions to the effect that the phrase 'public use' should be construed to be synonymous with public benefit, and that when it is determined that the use is of great benefit to the public at large, condemnation of private interests should be guaranteed, even though the use is not by the state or through any of its agencies. * * * It seems to us, however, that this is the announcement of a dangerous doctrine, tending to encroach upon private rights which the constitution has attempted to safeguard, and to render such rights as uncertain and varying as are the interests of different localities and opinions of different judges on different branches of business. * * * Under such liberal construction the brewer could demand successfully the condemnation of his neighbor's land for the purpose of the erection of a brewery, because forsooth, many citizens of the state are profitably engaged in the cultivation of hops. Condemnation would be in order for gristmills, and for factories for manufacturing the cereals of the state, because there is a large agricultural interest to be sustained. The principle is the same in one case as in the other; the difference is only in degree." But as Justice Holmes has said, most differences are only differences of degree. Washington will undoubtedly be obliged eventually to concede the right of eminent domain in certain cases where the public is vitally interested in the prosperity of a certain industry. The difference between the interest of the public in the brewery business referred to and the railroad business is only one of degree, but is such in the latter case that railroads are universally conceded the right to condemn lands essential to their operation.

One of the first cases in which, what may be termed the liberal doctrine, was followed was that of the Dayton Mining Co. v. Seawell, decided by the Supreme Court of Nevada.[7] The action was brought under a state statute, which provided that mining, milling, smelting or other reduction of ores were declared to be for the public use, and that the right of eminent domain might be exercised therefor. The district court, following the precedent of California, held that the statute was unconstitutional. This decision was, however, reversed by the Supreme Court. Said Justice Hawley: "The reasons in favor of sustaining the act under consideration are certainly as strong as any that have been given in support of the mill-dam or flowage acts, as well as some of the other objects heretofore mentioned. Mining is the greatest of the industrial pursuits in this state. All other interests are subservient to it. * * * The present prosperity of the state is entirely due to the mining developments already made, and the entire people of the state are directly interested in having the future developments unobstructed by the obstinate action of any individual or individuals."

In the comparatively recent case of Baillie v. Larson,[8] it appeared that the defendants had attempted to condemn a right-of-way for a tunnel across the plaintiff's property. The plaintiffs asked for an injunction, claiming that they had the right absolutely to exclude the defendants from their premises; the defendants attempted to justify their action under the federal statute, granting tunnel rights,[9] and also under the state statute then existing. The court

(6) State ex rel. Morril v. Superior Court, 33 Wash. 542.

(7) 11 Nev. 394.

(8) 138 Fed. 177.

(9) U. S. Comp. St., 1901, p. 1426.

held that under the decisions of the Supreme Court of the United States, a locator cannot by virtue of the federal statute run a tunnel through the holdings of a prior locator.[10] But, said the court: "A state may enact such laws for mining easements which, under the consideration of state courts, might grant the tunnel rights claimed by these defendants. The court then examined the statute and found that it did give such a right. The court further found that the granting of this right was proper under the then recent decision of the Supreme Court of the United States."[11]

Likewise in a comparatively recent Utah case, it appeared that the plaintiff company had brought an action to condemn a right-of-way for its aerial tramway over the defendants' mining claim; basing its right to condemn on a state statute.[12] The defendant contended that the statute was unconstitutional for the reason that the use proposed was not a public one. The Supreme Court granted the petition, and upheld the statute; basing its decision largely on the Nevada case just considered. The Utah case went up to the Supreme Court of the United States and was there affirmed. That court based its decision on the ruling in a somewhat similar case decided by it a few years before. The latter case involved the right to condemn a right-of-way across land for the purpose of an irrigation ditch, being based upon a state statute, holding that that use was a public one. The United States Supreme Court upheld the statute.[13] The court conceded that, "In some states, probably in most of them, the proposition contended for by the plaintiffs in error would be sound. But whether a statute of a state permitting condemnation by an individual for the purpose of obtaining water for his land or for mining should be upheld to be a condemnation for a public use, and, therefore, a valid enactment, may depend upon a number of considerations relating to the situation of the state and its possibilities for land cultivation, or the successful prosecution of its mining or other industries. * * * The validity of such statutes may sometimes depend upon many different facts, the existence of which would make a public use, even by an individual, where, in the absence of such facts, the use would clearly be private. These facts must be general, notorious, and acknowledged in the state, and the state courts may be assumed to be exceptionally familiar with them."

This decision means much to the mining as well as to other important industries. It will probably be followed in all states which have not already committed themselves to the contrary view, and certain of them may be induced to change their positions in the case of the leading industries in their midst.

The law has been steadily tending towards subjecting the rights of the individual to the welfare of the public. The former so-called "absolute rights" of individuals have come to be regarded as only relative, and the tendency traced in the law of eminent domain constitutes but one phase of the broader movement.

R. L. McWILLIAMS.

Spokane, Wash.

(10) Calhoun Co. v. Ajax Co., 182 U. S. 499.
(11) Clark v. Nash, 49 L. Ed. 1085.
(12) Highland Co. v. Strickley, 28 Utah, 215, 1 L. R. A. (N. S.) 976.
(13) 198 U. S. 1086.

## BANKS AND BANKING—OFFICIALS' CHECK TO OWN ORDER.

### HAVANA CENT. R. CO. v. KNICKERBOCKER TRUST CO.

**Supreme Court of New York, Appellate Division, First Department. December 10, 1909.**

Plaintiff corporation had a deposit account with the C. Trust Company subject to checks signed by V. as its treasurer. Between April 21, 1906, and June 15, following, V., as treasurer, drew three checks against an account payable to the order of another or himself, and signed with plaintiff's name by V. as treasurer, amounting in all to plaintiff's total deposit. These checks V. indorsed in blank and deposited them with defendant to the credit of his individual account. Defendant presented the checks to the drawee, received the proceeds, and credited them to V.'s account, which it later permitted him to withdraw. The trust company charged the checks against plaintiff's account, and closed it. Held, that such checks were notice to defendant that plaintiff's treasurer was drawing its money

for his individual benefit, and defendant, having received the money from the drawee bank, received it to plaintiff's use, and was liable to plaintiff therefor.

INGRAHAM, J.: The complaint alleges that the plaintiff is a foreign corporation and the defendant a trust company organized under the laws of the state of New York and doing business in the city of New York; that prior to February, 1906, one Van Voorhis was the treasurer of the plaintiff corporation; that prior to the 23d of February, 1906, an account was opened by the plaintiff corporation with the Central Trust Company of New York under an arrangement by which the checks drawn upon such account were to be signed by Van Voorhis as treasurer of the plaintiff corporation; that between the 21st of April, 1906, and the 15th of June, 1906, Van Voorhis drew three checks upon the deposit account of the plaintiff corporation with the Central Trust Company payable to the order of "W. M. Greenwood or C. W. Van Voorhis," signed "Havana Central Railroad Company, C. W. Van Voorhis, Treasurer," aggregating over $59,000; that at the same time Van Voorhis, the treasurer of the plaintiff corporation, had an individual deposit account with the defendant upon which he drew checks signed by himself individually; that Van Voorhis indorsed these three checks in blank, and deposited them with the defendant trust company to the credit of his individual account, and the checks were presented to the Central Trust Company by the defendant, and duly paid, and the proceeds thereof received by the defendant; that the Central Trust Company charged these checks against the plaintiff's deposit account; that subsequently the defendant permitted the said Van Voorhis to draw upon his said account to which these checks were credited until the 17th of July, 1906, when the account was closed by the presentation to and payment by the defendant to the said Van Voorhis of checks to the full amount appearing to his credit, which included the amount that the defendant had received from the Central Trust Company on account of these checks. The complaint then alleges that the said Van Voorhis deposited the said checks and each of them in his bank account with the defendant, and used the said checks and the proceeds thereof for his own uses and purposes without any right or authority so to do, and that the said checks, and each of them, were without any consideration whatever moving from said Van Voorhis to the plaintiff herein; that said Van Voorhis had no right or authority to draw upon the said account of the plaintiff or to use its funds except for the purposes of plaintiff's business, and that plaintiff was not at any of the times mentioned indebted to Van Voorhis in any sum whatever; that notice or inquiry by the defendant to and of the plaintiff would have revealed and disclosed these facts, and further revealed that said Vain Voorhis by drawing the said checks and each of them, and depositing them in his individual account with the defendant, was wrongfully misappropriating and converting the money of the plaintiff to his own use; that he was guilty of such misappropriation and conversion both in offering said checks for deposit with the defendant and in thereafter drawing from his aforesaid account the proceeds of the said checks, and appropriating the proceeds to his own use; that the defendant did not at any time make any inquiry of the plaintiff or any one else concerning the said checks or the transactions had therewith, and did not at any time give notice to the plaintiff concerning the said check or their offer for deposit with the defendant by Van Voorhis or any of the transactions relating in any wise thereto or had therewith.

Defendant by the demurrer concedes that Van Voorhis, the plaintiff's treasurer, having power to sign checks upon plaintiff's deposit account with its bank, signed checks in the name of the plaintiff to his own order without authority and deposited these checks with the defendant to his own individual account; that the defendant received these checks for the defaulting treasurer's individual account, collected the proceeds thereof and placed the same to the defaulting treasurer's individual credit, and subsequently paid out on Van Voorhis' the amount of such deposits. It had been for many years established in this state that, if a person holding money or property in a fiduciary capacity pays or transfers such money or property to a third party with notice of his relation to it for a purpose foreign to the trust, such third party cannot hold such money or property as against the true owner, and that, in the case of money, an action for money had and received will lie in favor of the true owner against the person who has received it with notice of its real ownership. If the defendant had knowledge that, by drawing these checks, Van Voorhis was misappropriating the corporation's money without its consent, and that the use to which Van Voorhis was putting the money was not the corporate uses, an action would lie.

We therefore come down to the question as to whether this defendant received this money with notice of the fact that it was being misapplied or misappropriated by Van Voorhis to his own use. Van Voorhis took to the defendant for deposit to his individual credit checks drawn in the name of the plaintiff by Van Voorhis as its treasurer to Van Voorhis'

own order, and offered those checks to the defendant for deposit to his (Van Voorhis') individual account. On its face this is clearly a transaction by which Van Voorhis was abstracting money from the treasury of the company to be credited to his individual account with the defendant. Certainly any bank officer looking at this check would see that Van Voorhis had drawn or was attempting to draw from the plaintiff's deposit account the sum of money there named to be paid to his own order. A person with a claim against the plaintiff corporation receiving such a check would necessarily have notice that the corporation was paying its debts with its own check. A person having an individual claim against Van Voorhis, and receiving in payment such a check to pay Van Voorhis' individual debt, would clearly have notice that Van Voorhis was using the funds of the plaintiff to pay an individual debt for which the plaintiff was not responsible. In this case Van Voorhis went to the bank, presented the check drawn by the plaintiff, acting through himself as treasurer, payable to his own order, and, indorsing it, deposited it with the defendant, which defendant accepted and received the proceeds. By that transaction the defendant became the owner of the check and its proceeds, and became personally indebted to Van Voorhis individually for the amount of the check. The effect of this transaction of which the defendant must be chargeable with notice was that the plaintiff's money had been taken from its possession and control and transferred to the defendant corporation, who, in return for the payment of that money to it, had become indebted to Van Voorhis individually for the amount that it received. This, it seems to me, placed the defendant in the same condition as if Van Voorhis had actually used the check or its proceeds to pay all individual indebtedness to the defendant with notice to the defendant of the actual ownership of the money or check used for that purpose. When this defendant received from Van Voorhis these checks and gave Van Voorhis credit for them, it became the owner of the checks or their proceeds. When or under what circumstances it discharged its indebtedness to Van Voorhis which arose upon the receipt of these checks upon deposit to Van Voorhis' personal account would seem to be immaterial. What the defendant did was to accept the checks on deposit, and thereby became indebted to Van Voorhis in their amount. Clearly, if the bank had actual notice of the fact that Van Voorhis was misappropriating the plaintiff's money, and that the transaction was thus fraudulent and unauthorized as to plaintiff, the defendant would have been liable to the plaintiff for the amount of money that it had received. And we get back, therefore, to the question as to whether the transaction, as it stood, was notice to the defendant that Van Voorhis was misappropriating the plaintiff's money when he drew in the name of the plaintiff the checks upon the plaintiff's deposit account payable to his own order. The delivery of these checks to the defendant gave them notice of the fact that the check was the check of the plaintiff corporation, that it was drawn by Van Voorhis as its treasurer, that it was drawn to the order of Van Voorhis individually, and that Van Voorhis requested the bank to collect those checks and to become indebted to him individually for their amount. It is quite clear that the defendant could not shut its eyes to the transaction and because of the great number of checks presented or the great mass of its business or the number of its depositors refuse to see what any one receiving a check and noticing its form must see. A bank or an individual is charged with notice of any fact which appears upon the face of a transaction, and which a person exercising ordinary intelligence and having ordinary knowledge of financial affairs would appreciate and understand. It is the conceded law of this state that a check drawn upon a trust fund by a trustee or a check drawn to the order of a trustee is notice to a person taking it of the fact that the fund upon which the check is drawn or the check itself is the property of the trust, and not the personal property of the individual trustee. Robinson v. Chemical Nat. Bank, 86 N. Y. 404; Gerard v. McCormick, 130 N. Y. 261, 29 N. E. 115, 14 L. R. A. 234; Ward v. City Trust Company, 192 N. Y. 61, 84 N. E. 585.

In Gerard v. McCormick, supra, the plaintiffs owned a building in Wall street known as the "Glass Buildings." One Boswell was the agent, having authority to receive and deposit the rent for the buildings and to draw on that account sums due for repairs, insurance, taxes, interest on incumbrances, his own commissions, and for the usual expenses of such buildings, and then to divide by check on the account the remainder among the plaintiffs according to their respective interests. The checks were signed by "William Boswell, Agt. Glass Buildings." Boswell used a check thus drawn to pay an individual indebtedness due to the defendant. Upon plaintiff's discovering this misappropriation, an action was commenced to recover the amount of the check from the defendant, and a judgment in plaintiff's favor was sustained by the Court of Appeals. In deciding the case the court said:

"The evidence was abundant to authorize the jury to find that the amount standing to the credit of 'William Boswell, Agt. Glass Build-

ings,' in the Corn Exchange Bank, belonged to the plaintiffs, and that by means of the check the sum represented by it was, by the fraud of Boswell, withdrawn from the account and paid to and received by the defendant."

The fact that the account upon which the checks in this action were drawn belonged to the plaintiff, that Van Voorhis by drawing the checks and depositing them to his own credit misappropriated the plaintiff's money, and that the checks were drawn without authority are alleged in the complaint and admitted by the answer. So that we have the same facts presented in both cases. And the court then in the Gerard case, supra, continued:

"The remaining question is whether the evidence authorized the court to submit to the jury the question of good faith, or was sufficient to authorize the jury to find that the defendant had notice that the check was drawn against an account not owned by Boswell."

And, after calling attention to the fact that there was nothing in the case which tends to raise any question about defendant's personal good faith, except that he received a check from Boswell in payment of his individual debt signed "William Boswell, Agt. Glass Buildings," without inquiry as to the right of Boswell to so use the fund, the court said that the question presented was "whether the form of the check was sufficient to put the defendant upon inquiry as to the authority of Boswell to use the money in payment of his debt." And, after a review of the authorities, it was held that the form of the signature to the check was sufficient to put the payee on inquiry as to the right of the agent to pay his personal debt out of the fund, and that, if a person having notice that money or property is held by another in a fiduciary capacity receives it without inquiry from the agent in satisfaction of his personal debt, the sum or property so received may be recovered by the true owner unless the agent was authorized to so dispose of it. We have in the case at bar all the facts presented in the Gerard case upon which a recovery was sustained; the only difference being that in one case the check was received in payment of an individual debt, and in the other case was received as the consideration for the defendant assuming a personal obligation to the agent individually. It is upon this latter distinction that the defendant claims that it is relieved from liability. But it seems to me that this distinction has no real bearing upon the question as to the liability of the defendant. The defendant received the check drawn by plaintiff's treasurer on plaintiff's bank account, payable to the plaintiff's treasurer individually, and received the money. The receipt of this check was notice to the defendant of those facts. And thus, when this defendant received the money chargeable with notice of the fact that this money was the plaintiff's money, concededly this defendant could not apply that money so received to the payment of a debt which Van Voorhis individually owed to the defendant so as to relieve the defendant from liability to the plaintiff for its money that defendant had received. It must be conceded that, while that money remained on deposit to the account of the treasurer individually with the defendant, the plaintiff could have maintained this action to recover the amount. It was money held by the defendant which belonged to the plaintiff, and of which fact the defendant had knowledge. Was the defendant discharged from this liability because it had paid Van Voorhis' individual checks upon it with plaintiff's money. It would not have been justified in paying the money out to discharge the individual debts of plaintiff's treasurer, although the plaintiff's treasurer had so ordered. It is not alleged or claimed that the money was paid for the benefit of or for the account of the plaintiff. The allegation, which is admitted, is that this treasurer having thus placed with the defendant bank a sum of money which belonged to the plaintiff, of which fact the defendant was chargeable, with knowledge ordered the defendant to pay it out to third persons by his individual check and for his own benefit. It seems to me clear that such a payment did not discharge the obligation of the defendant to repay to the plaintiff its money that the defendant had received, and that, therefore, a cause of action is alleged. This whole subject has been extensively reviewed by the Court of Appeals in the case of Ward v. City Trust Company, supra, and further discussion would seem quite unnecessary.

We are met in this case by an appeal to protect the financial institutions of this city from the liability that will be imposed upon them by charging them with notice of the form of all checks received on deposit. But, if an exception is to be made in favor of large institutions because of the impracticability of examining all checks presented to them, it must be made by either the legislature or the court of last resort, as the court has merely to administer the law as it finds it.

It follows, therefore, that the judgment appealed from must be affirmed, with costs, with leave to the defendant to withdraw the demurrer within 20 days and answer on payment of costs.

PATTERSON, P. J., and LAUGHLIN, J., concur.

NOTE—*Caution by Banks in Respect of Deposits Belonging to Another than Depositor.*—The principal case is evidently an extension of the rule, that a payee who receives corporate or trust funds in payment of individual debt of an officer or trustee is liable to the corporation or cestui que trust. But it has some support in authority. If we concede what is said by the dissenting opinion that the officer could have withdrawn the fund in cash, he had a right to check out for corporate purposes without exciting suspicion, it yet would make a case we think against the drawee bank and the collecting back, though the liability of the former is not discussed. Thus Farmers' Loan & Trust Co. v. Fidelity Trust Co., 86 Fed. 541, 30 C. C. A. 247, shows how very strictly persons dealing with drafts on a principal must act. Thus a general land agent's drafts on a railroad treasurer had been honored and it was claimed that a fourth draft, payment of which had been refused, came under a course of dealings whereby the agent had been held out as having authority to draw such drafts. For this draft the agent asked a certificate of deposit in his individual name. The court denying recovery on the draft said: "When an agent draws a draft in the name of his principal and receives from a bank money therefor, the presumption, in the absence of any showing to the contrary, is that he receives the money in the same capacity in which he draws the draft; that is to say as agent. But when the agent, for such draft, asks for and receives from the bank a certificate of deposit in his individual name, not only is such bank put on inquiry as to why, for money of the principal, the agent wants such certificate in his individual name, but such conduct—nothing to the contrary appearing—is equivalent to a declaration by the agent that the money is received by him in his individual capacity, and for his individual use." Reasoning out that principle, it might be said the drawee bank and the defendant bank had from the circumstances knowledge that the treasurer of plaintiff was using corporate funds not for corporate purposes, while the mere fact of converting a deposit into cash would not carry the same inference, as cash could be thought to be needed as a more convenient method of paying corporate expenses. In Nat. Bank v. Claxton, 97 Tex. 569, 65 L. R. A. 820, it was held that a depositor, though holding money in a fiduciary capacity, may draw it out at his pleasure, but if his conduct gives the bank any notice of misappropriation it must refuse to honor his checks.

Participation by a bank is, of course, forbidden. Swift v. Williams, 68 Md. 296, 11 Atl. 835; Bank v. Clapp, 76 N. C. 482. And this is carried even over to such accounts as those of factors. Thus, in the case of Union Stock Yards Nat. Bank v. Gillespie, 137 U. S. 411, the court, after stating that the factors were known to be in the commission business, says: "Presumably moneys deposited by them were the proceeds of cattle consigned to them for sale. Their business being known to the bank, such presumption goes with their deposits; and, while not of itself notice, is a circumstance to compel inquiry on the part of the bank in respect to any particular deposit. * * * When these gather around any deposit or line of deposits circumstances of a peculiar nature, which individualize that deposit or line of deposits, and inform the bank of peculiar facts of equitable cognizance, it is debarred from treating that deposit as that of moneys belonging absolutely to the depositor."

In Clemmer v. Drovers' Nat. Bank, 157 Ill. 206, 41 N. E. 728, the bank was held to have no right to apply moneys in a factor's account in payment of its own demands, as it could have done in an individual account.

A case similar to these was that of Union Stock Yards Nat. Bank v. Moore, 79 Fed. 705, 25 C. C. A. 150, and the court held where a deposit was made by a live-stock commission agent and factor then indebted to the bank, that the action depended upon litigated questions of fact, whether the consignors were, in equity, the owners of the money when it was deposited in the bank and whether the bank knew or had reason to believe that it so belonged and in the hands of the depositor as an agent or factor.

These kinds of account would seem to be dangerous for a bank to carry—a hardship not so much in the fact of a bank not being able to apply any part to its indebtedness to it, as depending upon whether as a fact a bank might be held when it should have known moneys were being misappropriated. As to indebtedness to a bank it ought to inquire into its borrower's solvency before lending and it ought to take into account such deposits, however large they are in amount, as these might, as business experience shows, indicate little or nothing in this way.

The rule of caution fairly deducible from the principal case and that of Farmers' Loan & Trust Co., *supra*, seems a little severe, but it has a simplicity about it preventing banks from getting entrapped. If a bank may have a very inconsiderable interest in the transaction, it is no hardship to forego any participation therein. If money is being misappropriated, or any circumstance may lead a bank to thus reasonably so suppose it may easily keep its skirts clear.

C.

## JETSAM AND FLOTSAM.

### THE LAW OF THE AIR.

The recent successful attempts at aviation open up a new and interesting field of legal inquiry. In the not distant future the aeroplane is likely to become a common means of transportation. This will necessitate the enactment of laws defining the relative rights of those who, Ariel-like, traverse the viewless pathway of the air, and of those terrestrial dwellers whose rights of person and property are likely to be infringed.

The St. Joseph (Mo.) Press states that Governor Hughes, of New York, believes that legislation will soon be necessary to control airships, and favors the prompt enactment of laws defining the right of aeroplanes to fly over others' property, and restricting or regulating the carrying of passengers.

Chief Justice Baldwin, of the Connecticut Supreme Court, recently lectured on this subject before the Yale law school, holding that the common-law ownership theory would have to be modified to meet the conditions of modern progress. The theory of the common law has

been that owners of the soil own all that is directly above and directly beneath their property, to an indefinite extent. On this theory, if a man owns all the atmosphere above him, no other man has a right to cross it with aeroplane or dirigible balloon without his consent. It would be trespass. Such machines are now very few in number, and are quite welcome to go where their owners will, but in time they may become numerous and develop unsuspected dangers. One a year flying over a man's house might be a negligible menace, but forty or fifty a day, with ropes dangling, ballast falling, anchors hanging, motors in danger of exploding, and the whole machine liable to drop and set fire to or smash crops or dwellings,—would be an entirely different matter.

Justice Baldwin thinks that a landowner's control of the air above his property must be limited to the exclusion only of that which may be a danger to him or an injury to his property. In a word, he cannot stop the flying machines, but if they should damage his trees, inconvenience or sicken his family by the smoke or smell, imperil his safety, or injure him, he would have cause for action and would be able to get redress. Existing laws would probably uphold claims for injuries thus inflicted, but the conditions of aero-navigation are so unstable and uncertain that very carefully prepared laws will be needed to define the rights and privileges of all parties.—Case and Comment.

## CORRESPONDENCE.

### THE AMERICAN CORPUS JURIS—A CRITICISM.

Editor Central Law Journal:

I have read with interest your editorial on the proposed American corpus juris (in other words, as you hint, a new cyclopedia). I think your article contains the germ of a great idea, which is, if I may attempt to state it, that if we are going to have a reformation of our law, it must be accomplished by some great mind which understands and is able to elucidate the fundamental principles of the law. As you very well say, the work described in the Green Bag will be nothing else "than a collection of exceedingly valuable monographs on special subjects of law." If our law has to be restated by the three gentlemen named, or by any other three, it will probably never be restated.

Justinian made the greatest re-statement that has ever been attempted, and it is open to debate whether he would not have done better to have adopted Ulpian entire than to have turned him over to Trebonian and his entire editorial staff and cut him up piecemeal,

Ulpian was the great leader—dismembered by Justinian. Bacon was the next, only to be treated in the same way by Coke and Blackstone, and the result is that we have no scientific statement of our law to-day.

Some of us think we see some good in Mr. Hughes' Grounds and Rudiments of the Law. And it seems to me that a question would be pertinent addressed to those who propose this magnificent legal establishment, whether such a work as Grounds and Rudiments of Law does not contain all that is fundamental in the law, and, if it does not, what it is that it fails to contain, except immense elaboration.

There is evidently a great move on toward the rehabilitation of the legal profession. and your editorial has struck the keynote. I believe that if you follow it up, you will not only be building up your Journal in making it a leader among the legal profession, but you will be doing a tremendous service to the profession itself as well.

It would be a great mistake, in my humble opinion, to have the proposed foundation started upon wrong lines, and it lies in your power to have it started along the true lines.

Yours very truly,

EDWARD D'ARCY.

St. Louis, Mo.

(Note.—We appreciate these kinds words of our correspondent, and it encourages us to believe we are voicing the protest of the great body of active practitioners.

When a general synthetical presentation of the whole law and its great principles are desired, what is better than Brooms' Legal Maxims, Bacon's Ordinances, or, in these modern days, Hughes' Grounds and Rudiments of Law. This latter work, which is based on the two older works mentioned, together with copious references to Smith's Leading Cases and some of the more important of the modern authorities, crowds together in the smallest space possible all of the great fundamental principles of the law and illustrates their application as far as possible to modern conditions.

This is as far as any synthetical work can go and be of value to the profession. True, it can go backwards and historically examine the origin of every rule and principle of law, but such investigation is wholly academic so far as any practical purpose is served. If it proceeds into the realm of present-day legal controversies, it becomes immediately involved in bitter contention that must inevitably discredit its authority and place it on the level of any other encyclopedia, except so far as some particular monograph may excell in excellence, as a monograph, anything before written on such subject.—Editor.)

## HUMOR OF THE LAW.

Samuel Untermeyer was being congratulated at the Manhattan Club on his recent successful conduct of a murder case.

The distinguished corporation lawyer modestly evaded all these compliments by the narration of a number of anecdotes of criminal law.

"One case in my native Lynchburg," he said, "implicated a planter of sinister repute. The planter's chief witness was a servant named Calhoun White. The prosecution believed that Calhoun White knew much about his master's shady side. It also believed that Calhoun, in his misplaced affection would lie in the planter's behalf.

"When on the stand Calhoun was ready for cross-examination, the prosecuting counsel said to him, sternly:

"'Now, Calhoun, I want you to understand the importance of telling the truth, the whole truth, and nothing but the truth in this case.'

"'Yas, sah.' said Calhoun.

"'You know what will happen, I suppose, if you don't tell the truth?'

"'Yas, sah,' said Calhoun, promptly. 'Our side'll win de case.'"

## WEEKLY DIGEST.

**Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.**



1. **Action**—Surviving Partner.—An action by a surviving partner is in his own right, so that he may join another claim involving an individual transaction.—Murphy v. Cochran, Iowa, 123 N. W. 349.

2. **Adjoining Landowners**—Spite Fences.—The malicious construction of a spite fence by defendant on his own land, cutting off plaintiff's view, light and air, held a nuisance entitling plaintiff to recover damages.—Barger v. Barringer, N. C., 66 S. E. 439.

3. **Admiralty**—Validity of Mortgage.—Where libel for possession of vessel involves a mortgage, and requires consideration of the question of fraud and mistake, jurisdiction will not be entertained.—The Helys. U. S. D. C., S. D. N. Y., 173 Fed. 928.

4. **Arbitration and Award**—Agreement to Arbitrate.—Agreements to arbitrate will be upheld, where the power to pass upon the subject-matter in dispute is given the arbitrator.—Conneaut Lake Agricultural Ass'n v. Pittsburg Surety Co., Pa., 74 Atl. 620.

5. **Assignments for Benefit of Creditors**—Agreement Among Creditors.—A committee elected by creditors to take charge of the business of the debtor does not have the authority of a syndic and cannot sue and hold a creditor bound who took no part in the proceedings.—Casanas v. Audubon Hotel Co., La., 50 So. 714.

6. **Attachment**—Corporate Shares.—At common law corporate shares were not subject to attachment, not being considered as a chattel or a debt.—Fowler v. Dickson, Del., 74 Atl. 601.

7. **Bailment**—Liability of Bailee.—A gin company held not liable to the owner for the loss of a bale of cotton after it was baled and placed in the company's yard with notice to the owner; there being no showing of negligence.—Batesville Gin Co. v. Whitten, Miss., 50 So. 695.

8. **Bankruptcy**—Corporations Subject to Act.—A corporation, engaged in generating electricity, transmitting it, and selling power and light to consumers, is neither a manufacturing nor a mercantile corporation, within the meaning of Bankr. Act, and is not subject to adjudication as an involuntary bankrupt.—In re Hudson River Electric Power Co., U. S. D. C., N. D. N. Y., 173 Fed. 934.

9.——Jurisdiction of Courts.—Where a third party claims an interest in property which was in the possession of a bankrupt at the time of the bankruptcy and passed into that of his trustee, the referee may by a summary proceeding require such third party to appear in the bankruptcy court and present his claim, and may adjudicate the rights of the parties in respect thereof.—Mound Mines Co. v. Hawthorne, U. S. C. C. of App., Eighth Circuit, 173 Fed. 882.

10.——Sale of Property in Dispute.—An order of a referee confirmed, which restrained a sale by a corporation of which the bankrupt was manager of its property pending a determination of its ownership.—In re Berkowitz, U. S. D. C., D. N. Jer., 173 Fed. 1013.

11. **Banks and Banking**—Discounts.—Where a person induced a bank to discount a note by false representations, the bank could cancel the credit given, and, having done so, the person's administratrix, upon his death, could not recover it.—Flatow v. Jefferson Bank, 119 N. Y. Supp. 860.

12.——Mistake in Crediting Account.—A bank held not liable to a customer, where he handed in his bank book and checks and a deposit slip, headed with the name of another customer, and the checks were entered from the slip in the customers' ledger to the credit of the other customer.—Schwartz v. State Bank, 119 N. Y. Supp. 763.

13.——Promise to Pay Debt of Another.—The guaranty by a bank, without benefit to itself, of the debt of another in which it has no interest, held beyond its powers.—Mine & Smelter Supply Co. v. Stockgrowers' Bank, U. S. C. C. of App., Eighth Circuit, 173 Fed. 859.

14. **Bills and Notes**—Acceptance of Draft.—A telegram sent by a bank addressed to another bank stating that it would honor a person's draft for a specified sum is an acceptance of a draft for such sum from which the bank may not recede.—Wells v. Western Union Telegraph Co., Iowa, 123 N. W. 371.

15.——Delivery.—Title to notes intended to be given to intestate's son but not delivered passed upon her death to the administrator, and the delivery thereafter not according to statute, to the son, did not pass title.—Burchet v. Fink, Mo., 123 S. W. 74.

16.——Taking Without Notice.—The phrase "without notice," used in relation to the taking of a note, usually refers to some defense of the maker or to some claim in title to it other than that of the seller, with or without notice of which a purchaser has taken it.—Vansickle v. Watson, Tex., 123 S. W. 112.

17. **Carriers**—Act of God.—A snowstorm, which obstructed defendant's yard, held an "act of God," so as to relieve defendant from liability for nondelivery of the passengers.—Cormack v. New York, N. H. & H. R. Co., N. Y., 90 N. E. 56.

18. **Compromise and Settlement**—Consideration.—Where a right is disputed and a compromise ensues, the compromise is supported by a sufficient consideration, and it will not be disturbed on it subsequently appearing that one of the parties thereto had no right in law.—Wood v. Kansas City Home Telephone Co., Mo., 123 S. W. 6.

19. **Constitutional Law**—License Tax on Hawkers and Peddlers.—Laws 1909, p. 293, c. 248 imposing a license tax on hawkers, peddlers, and transient merchants, and declaring that it shall not apply to the solicitation by permanent merchants from customers resident in the same or an adjoining county, held not to act uniformly upon all permanent merchants, and to be in violation of Const. art. 4, secs. 33, 34.—State v. Parr, Minn., 123 N. W. 408.

20. **Contracts**—Completion of Building.—Where building material was furnished under a contract providing for payment of the price on completion of the building, the price was recoverable on the owner's failure to complete the work within a reasonable time.—De Long v. Zeto, 119 N. Y. Supp. 765.

21.——Construction.—Lessee of a ferry held not bound to pay the retiring lessee for a sidewalk and pavement for which the retiring lessee was not entitled to be paid under his lease.

—Union Ferry Co. v. Southern Improvement & Ferry Co., La., 50 So. 704.

22.——Ignorance of Contents.—Where a party having the ability to read and understand instrument fails to do so and signs it without reading, he is bound unless fraud was practiced on him.—Blossi v. Chicago & N. W. Ry. Co., Iowa, 123 N. W. 360.

23. **Copyrights**—Assignment.—An assignee's copyright of certain cartoons entitled "Buster Brown" did not give to the assignee the exclusive right to the use of the title.—Outcault v Lamar, 119 N. Y. Supp. 930.

24. **Corporations**—Authority of General Manager.—In the absence of proof as to the nature of services or powers of a corporation employee designated "General Manager," the words would simply import that he is a general executive officer for all the ordinary business of the corporation. An authority to purchase an automobile cannot be presumed.—Studebaker Bros. Co. v. R. M. Rose Co., 119 N. Y. Supp. 970.

25.——Duress.—Proof that the president of a corporation permitted it to execute a contract because of threats of the adverse party to criminally prosecute him and others for swindling unless the contract was executed established a case of duress.—International Land Co. v. Parmer, Tex., 123 S. W. 196.

26.——Liability of Officers.—While the vice president of a corporation would be personally liable for injury to another caused by his actual fraud, such agent is not liable to third persons for negligence or nonfeasance.—Ray County Sav. Bank v. Hutton, Mo., 123 S. W. 47.

27.——Sale of Corporate Stock.—Where a seller of corporate stock agreed unconditionally to sell it for the buyer within a year, so as to net her a certain amount, a tender of the stock to the seller for sale was unnecessary.—Aken v. Clark, Iowa, 123 N. W. 379.

28. **Costs**—Taxation.—In view of Supreme Court rule 2, appellants, not notified of the decision on rehearing, held entitled to have the original record recalled for the purpose of taxing costs and disbursements in the Supreme Court.—Clark v. Lawrence County, S. D., 123 N. W. 868.

29. **Courts**—Amendment by Nunc Pro Tunc Order.—A court may amend its record by a nunc pro tunc order so as to make it speak the truth, but not to make it speak what it ought to have spoken.—Bouldin v. Jennings, Ark., 122 S. W. 639.

30.——Jurisdiction.—A creditor remitting a part of his debt to bring it within the jurisdiction of the court forgives the excess of the debt.—Merywethers v. Youmans, Kan., 105 Pac. 545.

31. **Covenants**—Breach of Warranty.—A purchaser resisting an action by a third person to locate a tramroad through the land held entitled to recover from the vendor the costs incurred and a reasonable attorney's fee.—Helton v. Asher, Ky., 123 S. W. 285.

32.——Action for Breach.—Where it was not shown that one to whom land was conveyed took possession for plaintiff's benefit, or that plaintiff had any interest therein except by a subsequent conveyance, he could not maintain an action for breach of a covenant of seisin.—Graves v. Garard, Ind., 90 N. E. 22.

33. **Criminal Law**—Comments of Judge on Defense.—Prejudicial comments of the judge on the defense in a criminal case held not cured by their withdrawal, but to entitle the defendant to a reversal and new trial.—Rudd v. United States, U. S. C. C. of App., Eighth Circuit, 173 Fed. 912.

34.——Confessions.—Where, on an arson trial, the only proof of the corpus delicti, outside of a confession, was that two barns were burned at midnight, and the confession was shown to have been induced by promises of protection from punishment, a conviction held unwarranted.—De Vore v. State, Ga., 66 S. E. 484.

35. **Criminal Trial**—Disposition of Cause.—Where the record in a criminal case discloses no error in the trial, but does not show that accused was present at the rendering of judgment of imprisonment, the case may be remanded, with directions to enter judgment having accused present at the time.—State v. Randolph, Mo., 123 S. W. 61.

36.——Judicial Notice.—The court takes judicial notice that it would not be unnatural for the commonwealth's attorney to state, on hearing that a homicide of an unusual character had been committed, that he would prosecute the case with all his power.—Hargis v. Commonwealth, Ky., 123 S. W. 239.

37. **Criminal Law**—Threat of Perjury Prosecution.—That witnesses were told that the district attorney had said he would prosecute for perjury if they did not tell the truth, held not ground to set aside a conviction.—State v. Williams, La., 50 So. 711.

38. **Curtesy**—Right to Income of Land.—Where unmined coal land is sold by the remainderman and the tenant by the curtesy, such latter has the right to the whole income during his life.—Deffenbaugh v. Hess, Pa., 74 Atl. 608.

39. **Creditors' Suit**—Judgment Against but One Partner.—A firm creditor, who obtains a judgment against one partner only, may not follow firm assets in the hands of third persons holding under a chattel mortgage, executed by such partner to secure his individual debts.—Rumsey-Sikemeier Co. v. Bank of Aurora, Mo., 123 S. W. 75.

40. **Damages**—Excessive Verdict.—A verdict for $4,750 for injury to a telephone lineman by which he permanently lost the use of his right arm, underwent several operations, suffered much pain, and was confined to the hospital for a considerable time held not excessive.—Clark v. Johnson County Telephone Co., Iowa, 123 N. W. 327.

41. **Election of Remedies**—Mistake as to Remedy.—The doctrine of the election of remedies applies only when a plaintiff, in fact, has two or more remedies; and a misconception of plaintiff's right to sue or to sue by a particular form of action is not an election of remedies.—Wells v. Western Union Telegraph Co., Iowa, 123 N. W. 371.

42.——Right to Assert Legal Title.—Plaintiffs asserting a claim to land may forego their equity to redeem from a foreclosure sale under the mortgage, and rely solely on a legal title, which they already held, notwithstanding the mortgage.—McFarland v. Cornwell, N. C., 66 S. E. 454.

43. **Eminent Domain**—Cutting Ice.—A health regulation, forbidding horses and men from going on ice, on lakes and ponds which were the source of water supply of cities and villages, to harvest the ice, held invalid.—People v. Kirk, 119 N. Y. Supp. 862.

44. **Estoppel**—Acts Constituting.—One may not deny that which he has asserted to be true, though he was in error as to the truth.—Criley v. Cessel, Iowa, 123 N. W. 348.

45. **Evidence**—Attempt to Compromise.—Letters passing between the parties in an attempt to effect a compromise held inadmissible.—Welker v. Appleman, Ind., 90 N. E. 35.

46.—City Ordinances.—The Supreme Court will not take judicial notice of a city ordinance.—Burke v. Tricalli, La., 50 So. 710.

47. **Executors and Administrators**—Right to Administer.—An adopted child acquires no right to administer on the estate of his adopting parent.—In re Smith's Estate, Pa., 74 Atl. 622.

48. **Explosives**—Care Required.—The degree of care required of persons using such dangerous instrumentalities as dynamite in their business is of the highest, and what might be reasonable care in respect to grown persons of experience would be negligence as applied to children.—Wood v. McCabe & Co., N. C., 66 S. E. 433.

49. **Fire Policy**—Exceptions in Policy.—Where a fire policy contained an exception that the company would not be liable for loss caused by explosion of any kind unless fire ensues and in that event for the damage by fire only, a loss occurring solely from an explosion, not by a preceding fire or by an explosion which occurred from the contact of escaping natural gas with a lighted match, held within the ex-

ceptions of the policy.—Stephens v. Fire Ass'n of Philadelphia, Mo., 123 S. W. 63.

50. **Fish**—Seine Fishing.—Under Code Supp. 1902, secs. 2539, 2540, 2547, seine fishing held prohibited in a nonnavigable slough formed by the separation of a part of the Mississippi River, cutting off an island from the mainland and wholly within the state of Iowa.—Little v. Green, Iowa, 123 N. W. 367.

51. **Fixtures**—Fences.—If a fence on a farm appeared to be a permanent one, a purchaser of the farm was entitled thereto, though it was erected by a tenant under an agreement with a former owner that he might remove it at the end of the term, unless the purchaser had actual notice of such agreement.—Esther v. Burke, Mo., 123 S. W. 72.

52. **Fraud**—Representation.—To enable a person injured by a false representation to sue for damages, held not necessary that the representation should have been made to him directly.—Wells v. Western Union Telegraph Co., Iowa, 123 N. W. 371.

53. **Frauds, Statute of**—Debt of Another.—A parol contract between creditors held not within the statute of frauds as a promise to pay the debt of another.—Hotmire v. O'Brien, Ind., 90 N. E. 33.

54. **Garnishment**—Service of Summons.—Service of summons upon a corporate garnishee by service upon the officers designated by statute, as well as upon a personal garnishee, takes effect immediately so as to make the garnishee liable for any subsequent violation of his duty.—Fowler v. Dickson, Del., 74 Atl. 601.

55. **Gas**—Unlawful Discrimination.—A gas company with the right under its charter to operate in several towns and cities in the state is not guilty of an "unlawful discrimination" as to one of such cities by abandoning its franchise and withdrawing its property and business therefrom.—East Ohio Gas Co. v. City of Akron, Ohio, 90 N. E. 40.

56. **Habeas Corpus**—Judgment.—A final judgment of a judge dismissing a writ of habeas corpus held res judicata of a similar court proceeding between the same parties for the same relief filed pending the proceedings before the judge.—Ex parte Fuller, Tex., 123 S. W. 204.

57. **Health**—Tenement Houses.—In apartment house held a tenement house, within Tenement House Law (Laws 1901, p. 889, c. 334) sec. 2, subd. 1.—Grimmer v. Tenement House Department of City of New York, 119 N. Y. Supp. 812.

58. **Homestead**—Abandonment.—The determination of a husband to abandon his homestead is binding on his wife, who remained with him in his absence from the country.—Rockwell Bros. & Co. v. Hudgens, Tex., 123 S. W. 185.

59. **Homicide**—Justification.—If a person believed that another was going to assault the person's brother, such person could defend his brother to the extent that the brother could defend himself.—Griffin v. State, Tex., 122 S. W. 553.

60. **Husband and Wife**—Action for Price of Necessaries.—Where the petition, in an action against a husband for a debt contracted by his wife, was based on the theory that the debt was for necessaries furnished her, plaintiff could not recover on the ground that defendant authorized his wife to contract the debt, since the allegations and proof must correspond.—Fields v. Florence, Tex., 123 S. W. 187.

61.——Duty to Maintain Wife.—Where there is no relation that legally imposes the duty of the wife's maintenance on the husband the law gives no power to make him maintain her.—Chapman v. Parsons, W. Va., 66 S. E. 461.

62.——Liability of Wife on Contract.—Under Rev. St. 1895, art. 2970, a wife held not liable on a contract to pay commissions for the sale of her separate property.—Billingsly v. Swenson Land Co., Tex., 123 S. W. 194.

63. **Indictment and Information**—Averring Matters of Judicial Notice.—Courts will take judicial notice of the holding of a general election and its result, so that, in a prosecution for violating the state prohibition law, the indictment need not allege the holding of the election, and that it resulted in favor of prohibition.—State v. Swink, N. C., 66 S. E. 448.

64.——Sufficiency.—It is the declared policy of the legislature, as well as of the court, to uphold indictments and informations whenever there has been a suostantial compliance with the statutory requirements.—Tillman v. State, Fla., 50 So. 675.

65. **Interest**—Right to Compound Interest.—An express promise to pay compound interest included in an account stated would be a nudum pactum, and unenforceable, in absence of consideration therefor.—Reusens v. Arkenbough, 119 N. Y. Supp. 821.

66. **Interstate Commerce**—Regulation.—Act Cong. March 4, 1907, c. 2939, sec. 2, 34 Stat. 1416 (U. S. Comp. St. Supp. 1909, p. 1170), regulating the hours of labor of train dispatchers, etc., held not invalid as applying to both interstate and intrastate commerce.—People v. Erie R. Co., 119 N. Y. Supp. 873.

67. **Intoxicating Liquors**—Drug Stores. — A pharmacist cannot defend an action to enjoin the conduct of his business as a liquor nuisance because no illegal sales of liquor were made by him personally.—Stromert v. Johnson, Iowa, 123 N. W. 336.

68.——Prosecution Under Local Option Law.—Time not being of the essence of the offense of selling liquors in violation of the local option law, the allegation as to date of sale in the information held wholly immaterial under Rev. St. 1899, sec. 2535 (Ann. St. 1906, p. 1509).—State v. Randolph, Mo., 123 S. W. 60.

69. **Judges**—Burden of Proving Prejudice.—The burden of proof is on defendant in a criminal prosecution, who alleges that the judge will not give him a fair trial.—Hargis v. Commonwealth, Ky., 123 S. W. 239.

70. **Judgment**—Res Judicata.—A decision of the court in an action by legatees against an executrix adverse to the executrix held res judicata upon her final accounting.—In re Walsh's Estate, N. J., 74 Atl. 563.

71. **Landlord and Tenant**—Injury to Tenant's Goods.—A landlord in a lease held not liable for leakage of the roof simply because the roof was in bad condition ascertainable by the exercise of ordinary care.—Pratt, Hurst & Co. v. Tailer, 119 N. Y. Supp. 803.

72.——Lease.—The leniency of a landlord in not insisting on prompt payment of the rent does not constitute a waiver of his right to forfeit lease for nonpayment.—O'Connor v. Timmermann, Neb., 123 N. W. 443.

73. **Larceny**—Innocent Possession.—Failure of accused to apply for a subpoena for the person from whom he claimed to have purchased the stolen property held competent, on the issue of defendant's claim of innocent possession.—Cleveland v. State, Tex., 123 S. W. 142.

74. **Libel and Slander**—Actionable Words.—The test whether a newspaper article is libelous per se is whether, to the mind of an intelligent man, the tenor of the article and the language used naturally import a criminal or disgraceful charge.—Church v. Tribune Ass'n, 119 N. Y. Supp. 885.

75. **Life Insurance**—Breach of Warranty.—A prior rejection of insured by another company was most material, and a false statement in respect thereto was a clear breach of his warranty as to the truth of statements on his application, offered as a consideration of the contract.—Fletcher v. Bankers' Life Ins. Co. of City of New York, 119 N. Y. Supp. 801.

76. **Limitation of Actions**—When Cause of Action Accrues.—If one acquires land pursuant to an agreement to convey it to another on payment of the purchase price, the cause of action for specific performance, or enforcement of the trust, if any exists, arises when he acquires the title.—Hoffman v. Buchanan, Tex., 123 S. W. 168.

77. **Mandamus**—Calling Stockholders' Meeting.—Mandamus cannot be granted upon the relation of a foreign holding corporation to compel the secretary of a like corporation to call a meeting of its stockholders to change the articles of incorporation of two other foreign corporations.—State v. De Groat, Minn., 123 N. W. 417.

78. **Master and Servant**—Contract of Hiring.—A hiring for an indefinite term at so much per month or year is a hiring at will and may be terminated in good faith by either party at any time without incurring liability.—Brookfield v. Drury College, Mo., 123 S. W. 86.

79.——Contributory Negligence.—Where two methods of moving a car from one track to another are apparent, whether a brakeman adopted the safer or more dangerous one is a question for the jury.—Richardson v. St. Louis & H. Ry. Co., Mo., 123 S. W. 22.

80.——Failure to Guard Machinery.— Under Act May 2, 1905 (P. L. 352), requiring machinery of every description to be guarded, a master is responsible for failure to guard the same, though it is customary not to guard the machinery in question.—Jones v. American Caramel Co., Pa., 74 Atl. 613.

81.——Injury to Servant.—Defendant held not liable for the death of a miner due to material falling from the roof, unless defendant was bound to furnish sufficient proper props on request and its failure to do so was the proximate cause of the injury.—Lammey v. Center Coal Mining Co., Iowa, 123 N. W. 356.

82.——Proximate Cause of Injury.—Where cars were negligently left standing on a side track at the top of a grade by defendant's employees without being secured, except by the setting of the brakes, and one of such cars ran down upon and killed plaintiff's intestate, the fact that the brake was released by children playing about the cars did not constitute such an intervening cause as would prevent defendant's negligence from being the efficient proximate cause of the injury.—Wellington v. Pelletier, U. S. C. C. of App., First Circuit, 173 Fed. 908.

83.——Safe Place to Work.—Notice to telephone employee that the master does not inspect the wires, etc. held not to relieve company of the duty to furnish a reasonably safe place, independent of its poles, cross-arms and wires, in which to work.—Olson v. Nebraska Telephone Co., Neb., 123 N. W. 422.

84.——The Relation.—A pumper whose duties required him to ride between pumping stations on the company's trains upon a pass given him for that purpose was as much in the company's service while necessarily riding between such stations in the proper place on the train as when operating the pumps.—Kunza v. Chicago & N. W. Ry. Co., Wis., 123 N. W. 403.

85.——Violation of Rules.—While the conduct of an employee in violating a rule promulgated by the master may be contributory negligence as a matter of law, if it was contrary to common prudence, yet if, under the facts, the servant might be justified in disregarding the rule, the question of his negligence in doing so is for the jury.—Houston & T. C. R. Co. v. Ravanelli, Tex., 123 S. W. 208.

86.——Violation of Rule.—While the violation by a servant of a rule of the master or of a statutory duty is contributory negligence, to defeat a recovery for a personal injury, it must have proximately caused or contributed to the injury.—Miami Coal Co. v. Kane, Ind., 90 N. E. 13.

87. **Mines and Minerals**—Construction of Oil Lease.—The oil from a well drilled by a lessor during the term of an unreleased part of the land without the lessee's consent held to belong to the latter and to be apportionable under the terms of the lease.—O'Neil v. Sun Co., Tex., 123 S. W. 172.

88.——Estoppel.—A grantee of the owners of a mining claim, which took out a patent in the names of prior owners and their heirs and assigns, held not thereby estopped from asserting that the interest of one of such patentees had previously been forfeited to his co-owners under the statute.—Van Sice v. Ibex Mining Co., U. S. C. C. of App., Eighth Circuit, 173 Fed. 895.

89.——Injunction.—In a suit for an injunction to restrain a lessor from interfering with the lessee's mining operations, held not necessary for the petition to allege that barytes or other minerals were in the land in paying quantities, in order to show that the lessee would suffer material injury thereby.—Dix River Barytes Co. v. Pence, Ky., 123 S. W. 263.

90.——Mining Partnership.—Members of a mining partnership not agreeing, those having the majority interest held entitled to control its management.—Bartlett & Stancliff v. Boyles, W. Va., 66 S. E. 474.

91. **Monopolies**—Combination Prohibited.—The organization by a number of jobbing houses of a brokerage company to do their own brokerage business in purchasing merchandise from manufacturers and others, and also a general brokerage business, held not to constitute a combination or conspiracy in restraint of interstate commerce or to monopolize such commerce, in violation of the Sherman anti-trust act.—Arkansas Brokerage Co. v. Dunn & Powell, U. S. C. C. of App., Eighth Circuit, 173 Fed. 899.

92. **Mortgages**—Mortgagee in Possession.—One succeeding to the rights of a mortgagee under an attempted foreclosure does not thereby become a mortgagee in possession, unless he enters lawfully, or his possession becomes lawful by acquiescence of the owner.—Deutsch v. Haab, 119 N. Y. Supp. 911.

93.——Sale Under Mortgage.—A mortgage not under seal conferred no right of possession on persons claiming under a foreclosure sale of the land by the mortgagee, but only a bare equity requiring intervention of a court at their instance to charge the land with the money loaned.—McFarland v. Cornwell, N. C., 66 S. E. 454.

94. **Municipal Corporations**—Fire Limits.—A city ordinance prohibiting construction of wooden building in fire limits held not violated by repairing a wooden building.—City of Mayville v. Rosing, N. D., 123 N. W. 393.

95.——Negligence of Independent Contractor.—A city held liable to a traveler injured by running into a wire placed around a new sidewalk by an independent contractor.—Prowell v. City of Waterloo, Iowa, 123 N. W. 346.

96.——Pollution of Stream.—A riparian owner, injured by nonpermanent pollution of a water course, held entitled to recover the diminution in the rental value of the land rented and the diminution in the value of the use of the land he occupied.—City of Georgetown v. Kelly, Ky., 123 S. W. 251.

97.——Validity of Ordinance.—That a city ordinance punishing an offense imposed heavier penalties than the state law punishing the same offense did not render the ordinance invalid as inconsistent with such state law.—Rossberg v. State, Md., 74 Atl. 581.

98. **Negligence**—Effect of Intoxication.—A person who has become intoxicated by his own voluntary act is chargeable with the result of his acts, deemed by the law to constitute contributory negligence, in the same degree and to the same extent as though he had been duly sober.—Little Rock Ry. & Electric Co. v. Billings, U. S. C. C. of App., Eighth Circuit, 173 Fed. 903.

99. **Officers**—Compensation.—A state, county or municipality, which before judgment of ouster against a de facto officer pays him the salary due at the time, is protected against any liability to the de jure officer for such salary.—Walters v. City of Paducah, Ky., 123 S W. 287.

100. **Partnership**—Pleadings.—The words "surviving partner" of a certain firm following plaintiff's name, held not part of the title of the cause, and did not prevent plaintiff from recovering on a partnership debt on an assignment of his partner's interest, though the partner was not dead.—Murphy v. Cochran, Iowa, 123 N. W. 349.

101.——Rights of Firm Creditors.—A firm creditor held not entitled to subject firm property to the payment of his debts as against a disposition by the sole remaining partner.—Rumsey-Sikemeier Co. v. Bank of Aurora, Mo., 123 S. W. 75.

102. **Penalties**—Actions.—Where the procedure is by penal action, as many violations of the law of the same grade and punishment may be set out as the state desires, because this practice is distinctly authorized by the Code.—Allison v. Commonwealth, Ky., 123 S. W. 267.

103. **Principal and Agent**—Purchasing Agent.—Payment by a principal of money advanced

by his agent for the purchase of wool became due to the agent without reference to a delivery of the wool.—Welker v. Appleman, Ind., 90 N. E. 35.

104.——Undisclosed Principal.—Where an agent makes a contract for the transportation of goods without disclosing the fact that he is acting merely as agent, his principal may sue the carrier for injury to the goods.—Wells v. Western Union Telegraph Co., Iowa, 123 N. W. 371.

105. **Property**—Malicious Use.—A person may not use his own property maliciously for the sole purpose of injuring another.—Barger v. Barringer, N. C., 66 S. E. 439.

106. **Public Lands**—Auditor's Certificate of Sale.—The State Auditor is authorized to determine whether the state's school lands are agricultural, timber, or mineral, and his determination cannot be called in question after a sale of the land, except in a direct proceeding.—State v. Red River Lumber Co., Minn., 123 N. W. 412.

107. **Railroads**—Authority of Station Agent.—A railroad station agent held to have implied authority to hire a person to take the place of another who had abandoned a contract to carry mail from the depot to the depot of another railroad.—Louisville & N. R. Co. v. Vaughn's Transfer Co., Ky., 123 S. W. 253.

108.——Contributory Negligence.—Whether the average man while walking on a railroad track would look around before he had traveled 220 feet at three miles per hour, or take other precautions to learn of the approach of a train, is a question for the jury.—Bourassa v. Grand Trunk Ry. Co., N. H., 74 Atl. 590.

109.——Crossing Accident.—Evidence of careful habit held insufficient to raise the inference that deceased went on the crossing in a prudent way.—Gibson v. Maine Cent. R. R., N. H., 74 Atl. 589.

110.——Duty to Look and Listen.—A person about to cross railroad tracks is not necessarily negligent as a matter of law in failing to continue to look and listen at all times for approaching trains, where he was misled by the railroad company, or his attention was rightfully directed to something else as well.—Farris v. Southern Ry. Co., 122 S. W. 457.

111.——Identification of Passenger on Return Ticket.—A passenger ticket, stipulating for a return trip on the passenger identifying himself as the original purchaser, held not to provide for identification by means of the signature of the passenger alone.—Houston & T. C. R. Co. v. Lee, Tex., 123 S. W. 154.

112.——Negligence.—Whether the permitting by defendant railroad of trees and a building which obstructed the view of trains to remain on the right of way contributed to the death of one killed while attempting to cross the track held a question for the jury.—Missouri, K. & T. Ry. Co. of Texas v. King, Tex., 123 S. W. 151.

113. **Removal of Causes**—Assignment to Prevent Removal.—An assignment of a claim held not without consideration and fictitious authorizing the assignee to sue thereon in the state court, and thus prevent removal to the federal court.—Wells v. Western Union Telegraph Co., Iowa, 123 N. W. 371.

114. **Sales**—Separate Writings.—In an action upon an agreement guaranteeing certain earnings on two shares sold to plaintiff in a stallion, a prior written guaranty as to earnings on one share of stock held properly received as part of the transaction.—Worsley v. Ayres, Iowa, 123 N. W. 353.

115. **Street Railroads**—Consolidation.—A consolidation agreement held to charge defendant with liability of the consolidated street car company to contribute to the cost of maintaining lights at a crossing over the tracks of a railroad company.—Beaumont Traction Co. v. Texarkana & Ft. S. Ry. Co., Tex., 123 S. W. 124.

116.——Duty of Motorman.—A street railway motorman approaching a crossing is only bound to observe persons or vehicles approaching the track within the ordinary range of his vision while looking ahead.—South C. & C. St. Ry. Co. v. Crutcher, Ky., 123 S. W. 268.

117.——Injury to Person on Track.—A person, seeing a rapidly approaching street car and attempting to cross the street in front of it to board it on the other side of the street held negligent.—Flynn v. Joline, 119 N. Y. Supp. 783.

118.——Negligence.—A motorman of a street car held not negligent in failing to observe an approaching ice wagon which collided with the car.—South C. & C. St. Ry. Co. v. Crutcher, Ky., 123 S. W. 268.

119. **Subrogation**—Advances for Discharge of Vendor's Lien.—One voluntarily advancing money to pay vendor's lien notes without any understanding that he shall have a lien to secure a reimbursement is not entitled to subrogation.—Hatton v. Bodan Lumber Co., Tex., 123 S. W. 163.

120. **Subscriptions**—Binding Effect.—Though a contract be a mere subscription, if it be acceded to on the terms on which it is made, and labor or money expended on the faith thereof, the subscriber is bound thereby.—National Valley Bank of Staunton v. Houston, W. Va., 66 S. E. 465.

121. **Taxation**—Funeral Expenses.—Reasonable cost of keeping a burial plot and monument in repair is properly a part of the "funeral expenses," exempt from the transfer tax on an estate; and so a bequest of $250, to be invested and the income used for such a purpose, is exempt.—In re Maverick's Estate, 119 N. Y. Supp. 914.

122. **Telegraphs and Telephones**—Delay of Message.—A seller, whose cablegram, accepting an offer, was delayed in delivery, during which time the price offered had declined, held not entitled to recover against the telegraph company.—Western Union Telegraph Co. v. William Rhett & Co., Miss., 50 So. 696.

123.——Liability for Special Damages.—A telegraph company held not liable for special damages, unless it knew, or had reason to believe from the telegram itself or from extraneous matters, that damage was likely to result.—Wells v. Western Union Telegraph Co., Iowa, 123 N. W. 371.

124. **Trusts**—Right to Conveyance of Land.—Where one pays for land with his own means, another claiming that the former acquired and held the title in trust for him is not entitled to the conveyance except on repayment of the purchase price thus advanced.—Hoffman v. Buchanan, Tex., 123 S. W. 168.

125. **Vendor and Purchaser**—Improvements by Vendee.—On repudiation of a contract of sale the vendee may remove permanent improvements, if practicable, which do not enhance the value of the premises.—Glass v. Hampton, Ky., 122 S. W. 803.

126. **Wills**—Conditions Subsequent.—Where a condition subsequent to the vesting of an estate is illegal or becomes impossible of performance, nonperformance does not prevent the grantees' estate from becoming absolute.—Jones v. Jones, Mo., 123 S. W. 29.

127.——Election.—Widow held bound by her election to take under the statute to disregard her husband's will, and could not invoke her to her advantage a certain provision therein.—Ashelford v. Chapman, Kan., 105 Pac. 534.

128.——Legacies Charged on Property.—Under a conveyance in trust, subject to a life estate in the grantor, nothing remained to the grantor's estate of certain lands in California which could be used for the payment of a legacy to his widow in exoneration of a charge on Iowa lands.—Douglass v. Lougee, Iowa, 123 N. W. 967.

129. **Witnesses**—Confidential Relations.—A minister who simply acted as a friend and interpreter in a matter having nothing to do with spiritual affairs is a competent witness.—Blossi v. Chicago & N. W. Ry. Co., Iowa, 123 N. W. 360.

130.——Husband and Wife.—The common law made no distinction between the incompetency of one spouse to testify for or against the other as a matter of disability and incompetency as a matter of privilege.—Ex parte Beville, Fla., 50 So. 685.